Supreme Court, U.S.
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No. 99-206

In The

SUPREME COURT OF THE UNITED STATES

PAUL WIMMER,

Petitioner,

v.

SUFFOLK COUNTY POLICE DEPARTMENT
and JOHN GALLAGHER,

Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITIONER'S REPLY BRIEF

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(1) The question presented by the petition was specifically litigated by the parties in the court below, and was the dispositive issue in decision of the Second Circuit.

In the court of appeals respondents successfully contended that a complainant enjoys no statutory protection under § 704(a) if his complaint is grounded on a misapprehension of the scope or commands of Title VII itself. Respondents insisted that a complainant's good faith belief that he was opposing illegal discrimination would be irrelevant if "the conduct complained of simply wasn't an unlawful employment practice under Title VII."[1]

> [T]he reasonable good faith component can only apply to conduct otherwise covered by Title VII. To hold otherwise would be to allow unrestricted access to the federal courts, via Title VII, . . . regardless of whether or not that conduct was proscribed by Title VII.[2]

Respondents argued that they were entitled to prevail because

> the conduct complained of, even if accepted as fact, simply did not constitute an employment practice at all, and any belief held by Wimmer that it was an employment practice was not reasonable *as a matter of law*.[3]

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[1]Brief for Defendants-Appellants Suffolk County Police Department, No. 97-7321 (2d Cir.), p. 33. The authority cited by respondents for this assertion was *Manoharan v. Columbia University of Physicians & Surgeons*, 842 F. 2d 590 (2d Cir. 1988). The petition recognized that that was precisely the rule in *Manoharan*. Petition, p. 11.

[2]*Id.* at 34; see *id.* at 33("Nowhere in this Court's opinion [in *Reed v. A.W.Lawrence & Co., Inc.*, 95 F. 3d 1170 (2d Cir. 1996)] was the plaintiff relieved of demonstrating that the action complained of must be cognizable under Title VII.")

[3]*Id.* at 27 (emphasis added).

Respondent's contention that a complaint was to be assessed in light of a *correct* interpretation of Title VII's substantive commands was consistent with prior Second Circuit § 704 cases, as well as with decisions in Fourth and Sixth Circuits. See Petition, 11-12.

On the other hand, petitioner in the court of appeals insisted that a Title VII complainant is protected by § 704 even if his or her complaint involves a mistake of law. Petitioner specifically relied on the Ninth Circuit decision in *Moyo v. Gomez*, 32 F. 3d 1382 (9th Cir. 1994), quoting its holding that

> an erroneous belief that an employer engaged in an unlawful employment practice is reasonable, and thus actionable under § 704(a), if premised on a mistake made in good faith . . . [A] good faith mistake may be one of fact *or of law*.[4]

We urged that the contrary standard, which had been applied by the district court and was advanced by respondents, would be unfair to employees untutored in the law.

> In making the determination whether plaintiff had . . . a reasonable belief, it is immaterial that plaintiff may not have an intimate understanding of the legal import of Title VII. Whether a complaint was asserted in good-faith will be determined by the jury in part by the extent of the plaintiff's legal sophistication, making due allowance for the limited knowledge of most Title VII plaintiffs. . . . [I]f the

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[4]Reply Brief for Plaintiff-Appellant Paul Wimmer, No. 97-7321 (2d Cir.), pp. 5-6 (*quoting Moyo v. Gomez*, 32 F. 3d at 984)(emphasis added).

district court decision is sustained it would be penalizing [petitioner] for lacking legal expertise.[5]

Our argument was consistent with the prevailing rule in the Ninth and District of Columbia Circuits. Petition, pp. 14-16.

The Second Circuit squarely resolved this legal dispute in favor of respondents. The court of appeals eschewed any inquiry as to whether petitioner actually believed the practices he opposed were illegal, or into what the state of Title VII law might have been in 1994, when petitioner complained about discrimination. The sole and controlling issue, the court of appeals insisted, was whether the actions about which petitioner had complained would, if they had occurred, have *actually* violated Title VII.

> " . . . The opposition must be directed at an unlawful employment practice . . . ." . . . Wimmer presented evidence that certain members of the Department acted in a discriminatory manner toward the public. . . . Wimmer testified he never heard a racial epithet directed toward himself or any other member of the Department during his employment. In the absence of such evidence, Wimmer's claim of retaliation is not cognizable under Title VII *because his opposition was not directed at an unlawful practice* of his employer.

(App. 16a)(Emphasis added).

In their Brief in Opposition, respondents contend that "[t]here is no division among the Circuit Courts" regarding how to treat a complainant's error of law in a § 704(a) case. (R.Br.Opp. 24). But respondents now maintain that the assertedly uniformly accepted legal standard is neither the strict rule of the Second, Fourth and Sixth Circuits, nor the

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[5]Brief for Plaintiff-Appellant Paul Wimmer, No. 97-7321 (2d Cir.), p. 24 n. 5.

"mistake of law" rule in the Ninth and District of Columbia Circuits. Rather, respondents in this Court assert that the correct and generally accepted rule is that the reasonableness of a complaint should be determined in light of "the state of the law at the time the employees engaged in the alleged protected activities." (R.Br.Opp. 24). That is indeed the very standard utilized by the Third, Seventh, Eighth and Eleventh Circuits, see Petition pp. 12-14, but it assuredly is not the standard which respondents advanced in the courts below or which the Second Circuit adopted.

The distinction between the holding of the Second Circuit below and the rule of law which respondents now label the uniform national standard is illustrated by the differences between passages in the Brief in Opposition and in respondents' earlier brief in the Second Circuit. In this Court, respondents insist

> an employee need not establish that the conduct he opposed was in fact a violation of Title VII.

(R.Br.Opp.18). But in the court of appeals, respondents objected to this very principle:

> Wimmer contends in his brief at p. 21 that the district court erred in dismissing his Title VII claim because, "[i]t is a well established principle that in a retaliation case an employee need not prove that the conduct opposed was in fact a violation of Title VII." *This contention is only half correct.*[6]

Respondents advised the Second Circuit that the doctrine invoked by petitioner was "half" incorrect because on respondents' view a complaint was not protected if the complainant had erred in thinking that Title VII prohibited the actions complained of. (See infra, text at n. 3). That

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[6]Brief for Defendants-Appellees, No. 97-7321 (2d Cir.), pp. 26-27 (emphasis added).

distinction, of course, is precisely the question at issue in this case.

(2) Respondents contend that petitioner is precluded from asking this Court to overturn *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), because we did not urge the Second Circuit to do so. In the lower courts, however, litigants are constrained to limit their arguments to interpreting existing Supreme Court precedent, since the courts of appeals have no authority to overturn or disregard decisions of this Court.

(3) Respondents' forcefully written statement of the case illustrates dramatically the numerous disputes of fact that exist in this litigation. Those disputes were never resolved by the jury empaneled to hear this case, because respondents argued and the lower courts held as a matter of law that even on petitioner's version of the facts respondents were entitled to prevail. A decision by this Court sustaining the legal sufficiency of petitioner's contentions would leave respondents free on remand to continue to defend this case on factual grounds.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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